

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DUANE BERRYHILL,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION,  
ALEXIS FONG, and DOES 1 to 20,  
inclusive,

Defendants.

No. 2:23-cv-00315 WBS AC

ORDER RE: PLAINTIFF'S MOTION  
TO REMAND

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Plaintiff Duane Berryhill initiated this premises liability action against defendants Costco Wholesale Corporation and Alexis Fong (a Costco store manager) for injuries resulting from a slip-and-fall incident at a Costco store. (See Compl. (Docket No. 1-1).) Defendants removed the action to this court from the San Joaquin County Superior Court based on diversity. (Docket No. 1.)

Plaintiff now moves to remand, arguing that removal is improper because complete diversity does not exist. (Mot.

(Docket No. 5).) Defendant contends that defendant Fong was fraudulently joined to defeat diversity. (Opp'n (Docket No. 6).)

I. Fraudulent Joinder

"Under 28 U.S.C. § 1441, a defendant may remove an action filed in state court to federal court if the federal court would have original subject matter jurisdiction over the action." Moore-Thomas v. Ala. Airlines, Inc., 553 F.3d 1241, 1243 (9th Cir. 2009). There is a "strong presumption" against exercising removal jurisdiction, and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (internal citations omitted).

Federal courts have original jurisdiction over cases where complete diversity exists between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). Complete diversity exists where each plaintiff is a citizen of a different state than each defendant. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001).

"In determining whether there is complete diversity, district courts may disregard the citizenship of a non-diverse defendant who has been fraudulently joined." Grancare, LLC v. Thrower, 889 F.3d 543, 548 (9th Cir. 2018) (citing Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914)). "A defendant invoking federal court diversity jurisdiction on the basis of fraudulent joinder bears a 'heavy burden' since there is a 'general presumption against finding fraudulent joinder.'" Grancare, 889 F.3d at 548 (quoting Hunter v. Philip Morris USA,

1 582 F.3d 1039, 1046 (9th Cir. 2009)).

2 "There are two ways to establish fraudulent joinder:  
3 (1) actual fraud in the pleading of jurisdictional facts, or (2)  
4 inability of the plaintiff to establish a cause of action against  
5 the non-diverse party in state court." Id. (internal quotation  
6 marks omitted). "Fraudulent joinder is established the second  
7 way if a defendant shows that an 'individual joined in the action  
8 cannot be liable on any theory.'" Id. (quoting Ritchey v. Upjohn  
9 Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)) (alteration  
10 adopted). This requires "extraordinarily strong evidence or  
11 arguments that a plaintiff could not possibly prevail on her  
12 claims against the allegedly fraudulently joined defendant." Id.

13 "[T]he test for fraudulent joinder and for failure to  
14 state a claim under Rule 12(b)(6) are not equivalent. A claim  
15 against a defendant may fail under Rule 12(b)(6), but that  
16 defendant has not necessarily been fraudulently joined." Id. at  
17 549. Rather, the standard for fraudulent joinder is akin to the  
18 "wholly insubstantial and frivolous" standard for dismissing  
19 claims under Rule 12(b)(1) for lack of federal question  
20 jurisdiction. Id. "[I]f there is a possibility that a state  
21 court would find that the complaint states a cause of action  
22 against any of the resident defendants, the federal court must  
23 find that the joinder was proper and remand the case to the state  
24 court." Id. (citing Hunter, 582 F.3d at 1046) (emphasis in  
25 original). Put another way, "[r]emand must be granted unless the  
26 defendant shows that the plaintiff 'would not be afforded leave  
27 to amend his complaint to cure the purported deficiency.'" Nasrawi v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1170

1 (E.D. Cal. 2011) (Wanger, J.) (quoting Burris v. AT & T Wireless,  
2 Inc., No. 06-02904 JSW, 2006 WL 2038040, at \*2 (N.D. Cal. 2006)).

3 In analyzing fraudulent joinder, a court may look  
4 beyond the pleadings and conduct a “summary inquiry . . . to  
5 identify the presence of discrete and undisputed facts that would  
6 preclude plaintiff’s recovery against the in-state defendant.”  
7 Allen v. Boeing Co., 784 F.3d 625, 634 (9th Cir. 2015) (citing  
8 Hunter, 582 F.3d at 1044) (internal quotation marks omitted).

9 There is no dispute that plaintiff and defendant Fong  
10 are both citizens of California and thus lack diversity.  
11 Defendant Costco is a citizen of Washington. (See Decl. of  
12 Nathaniel L. Dunn (Docket No. 2) ¶ 8.) Accordingly, removal is  
13 appropriate only if defendant Fong was fraudulently joined.

14 Plaintiff alleges that defendant Fong is responsible  
15 for his injuries under a theory of premises liability. The  
16 elements of a premises liability claim are “a legal duty of care,  
17 breach of that duty, and proximate cause resulting in injury.”  
18 Kesner v. Super. Ct., 1 Cal. 5th 1132, 1158 (Cal. 2016).

19 “Premises liability is grounded in the possession of the premises  
20 and the attendant right to control and manage the premises;  
21 accordingly, mere possession with its attendant right to control  
22 conditions on the premises is a sufficient basis for the  
23 imposition of an affirmative duty to act.” Id. (internal  
24 quotation marks omitted). “[C]ontrol is defined as the power to  
25 prevent, remedy or guard against the dangerous condition.”  
26 Colonial Van & Storage, Inc. v. Super. Ct., 76 Cal. App. 5th 487,  
27 497 (2d Dist. 2022) (internal quotations and citations omitted).  
28 The defendant must also have actual or constructive knowledge of

1 the dangerous condition. Ortega v. Kmart Corp., 26 Cal. 4th  
2 1200, 1206 (Cal. 2001).

3 In arguing that defendant Fong was fraudulently joined,  
4 defendant makes various factual allegations pertaining to the  
5 slip-and-fall incident, including (1) “[t]here was no failure to  
6 develop appropriate safety procedures” at that Costco location;  
7 (2) defendant Fong’s “job responsibilities do not include picking  
8 up empty pallets [like the one plaintiff allegedly tripped on] or  
9 overseeing the employees who do”; (3) defendant Fong lacked  
10 actual notice of the allegedly dangerous condition and was not  
11 present on the premises at the time of plaintiff’s injury; and  
12 (4) plaintiff’s actions contributed to his injury. (See Opp’n at  
13 6-8.) Defendant Fong provides a declaration in support of these  
14 allegations. (See Docket No. 6-5.)

15 These arguments fail for multiple reasons. First, a  
16 self-serving declaration written by the defendant in question  
17 hardly qualifies as the “extraordinarily strong evidence”  
18 required to prove fraudulent joinder. See Grancare, 889 F.3d at  
19 548. This declaration does not provide sufficient evidence to  
20 conduct a “summary inquiry” that resolves in defendant’s favor,  
21 which “itself points to an inability of the removing party to  
22 carry its burden.” See Allen, 784 F.3d at 634 (citing Hunter,  
23 582 F.3d at 1044). Second, defendants’ arguments would require  
24 the court to engage in a “searching inquiry into the merits of  
25 the plaintiff’s case,” which is inappropriate when considering  
26 fraudulent joinder. See Grancare, 889 F.3d at 548-49.

27 Defendant has not provided strong evidence or cited any  
28 authority suggesting that plaintiff could not possibly prevail

1 against defendant Fong on a premises liability claim. To the  
2 contrary, “[c]ourts have specifically allowed a plaintiff to  
3 bring . . . premises liability claims against store managers in  
4 situations similar to the instant [a]ction.” See, e.g., Thomas  
5 v. WalMart Stores, Inc., No. 18-cv-03422 RSWL SK, 2018 WL  
6 3046967, at \*4 (C.D. Cal. June 19, 2018) (citing Trujillo v.  
7 Target Corp., No. 17-cv-06429 VAP GJS, 2017 WL 4864490, at \*5  
8 (C.D. Cal. Oct. 26, 2017); Revay v. Home Depot U.S.A., Inc., No.  
9 2:14-cv-03391 RSWL AS, 2015 WL 1285287, at \*3 (C.D. Cal. Mar. 19,  
10 2015)) (rejecting fraudulent joinder argument and remanding slip-  
11 and-fall premises liability case brought against WalMart store  
12 manager). See also, e.g., Nieves v. Costco Wholesale Corp., No.  
13 3:22-cv-00977 JD, 2022 WL 5199904, at \*2 (N.D. Cal. Oct. 5, 2022)  
14 (rejecting fraudulent joinder argument and remanding slip-and-  
15 fall premises liability case brought against Costco store manager  
16 who was not present in the store on the day of the alleged  
17 injury); Dirkes v. Sam’s W., Inc., No. 2:22-cv-03466 JLS MAR,  
18 2022 WL 17098672, at \*5 (C.D. Cal. Sept. 7, 2022) (“As the  
19 analyses in similar cases recognize, it is plausible that [the  
20 defendant] may be liable for . . . premises liability as a store  
21 manager.”).

22           Based on the argument and evidence presented by  
23 defendant, the court cannot conclude that there is no possibility  
24 that defendant Fong may be liable on a theory of premises  
25 liability. Accordingly, the court concludes that defendant Fong  
26 was not fraudulently joined, and therefore complete diversity is  
27 lacking. Defendant has thus failed to overcome “both the strong  
28 presumption against removal jurisdiction and the general

1 presumption against fraudulent joinder.” See Hunter, 582 F.3d at  
2 1046 (internal quotation marks omitted).

3 II. Attorneys’ Fees

4 Plaintiff requests that the court award him attorneys’  
5 fees and costs incurred in filing this motion pursuant to 28  
6 U.S.C. § 1447(c). “Absent unusual circumstances, courts may  
7 award attorney’s fees under § 1447(c) only where the removing  
8 party lacked an objectively reasonable basis for seeking  
9 removal.” Martin v. Franklin Capital Corp., 546 U.S. 132, 141  
10 (2005).

11 Here, defendants failed to cite any relevant evidence  
12 or legal authority that supported removal. Further, there are  
13 numerous cases that have rejected nearly identical fraudulent  
14 joinder arguments involving store managers in slip-and-fall  
15 premises liability cases; at least one of those cases involved  
16 defendant Costco. See Nieves, 2022 WL 5199904, at \*2.  
17 Accordingly, the court concludes that defendants lacked an  
18 objectively reasonable basis for seeking removal and will grant  
19 plaintiff’s request for attorneys’ fees. See Grancare, 889 F.3d  
20 at 552 (affirming district court’s grant of attorneys’ fees  
21 following remand where defendant’s fraudulent joinder argument  
22 lacked reasonable support in district court case law); Hung Duong  
23 v. ITT Educ. Servs., Inc., No. 1:14-cv-01257 AWI SA, 2014 WL  
24 4634998, at \*7 (E.D. Cal. Sept. 10, 2014) (awarding attorneys’  
25 fees where Defendant argued fraudulent joinder but “identified no  
26 cases which counter Plaintiff’s cases, meaning the weight of  
27 authority was firmly against Defendants’ position”).

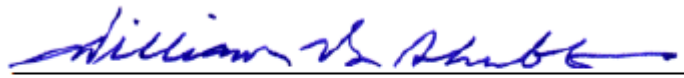
28 Plaintiff requests \$2,563 in attorneys’ fees and costs.

1 This figure results from 9 attorney hours billed at a rate of  
2 \$275, plus \$88 in travel costs. Defendants do not dispute that  
3 the number of hours or rate requested are reasonable.

4 Based on the court's experience, the amount requested  
5 appears reasonable. See Oth Ingram v. Oroudjian, 647 F.3d 925,  
6 928 (9th Cir. 2011) (in determining what constitutes a reasonable  
7 attorneys' fee, district courts may rely on "their own knowledge  
8 of customary rates and their experience concerning reasonable and  
9 proper fees"). See also, e.g., Siafarikas v. Mercedes-Benz USA,  
10 LLC, No. 2:20-cv-01784 JAM AC, 2022 WL 16926265, at \*3 (E.D. Cal.  
11 Nov. 14, 2022) (approving hourly rates ranging from \$250 to  
12 \$500); Hung Duong, 2014 WL 4634998, at \*8 (granting \$2,605 in  
13 attorneys' fees and costs associated with motion to remand  
14 following defendant's removal based on fraudulent joinder, based  
15 on 8.4 hours of attorney work and \$85 in costs).

16 IT IS THEREFORE ORDERED that plaintiff's motion to  
17 remand and for attorneys' fees (Docket No. 5) be, and the same  
18 hereby is, GRANTED. This case is hereby REMANDED to the Superior  
19 Court of the State of California, in and for the County of San  
20 Joaquin. Plaintiff is awarded \$2,563 in attorneys' fees and  
21 costs.

22 Dated: May 7, 2023

  
WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE